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## ARIZONA ATTORNEY GENERAL

March 8, 1957  
Opinion No. 57-43

REQUESTED BY: Honorable J. Morris Richards  
Senator, Arizona State Legislature

OPINION BY: ROBERT MORRISON, The Attorney General  
BERNARD T. CAINE, Assistant Attorney General

QUESTION: Is there authority for the imposition  
of a gasoline tax by cities and counties  
in addition to the State Gasoline Tax?

CONCLUSION: 1. Charter cities - yes.  
2. Common council cities - yes.  
3. Counties - no.

Authority for the imposition of the State Motor Vehicle Fuel Tax is found in A.R.S. § 28-1501, which reads:

"Every distributor shall pay to the state, in addition to all other taxes provided by law, a license tax of five cents for each gallon of motor vehicle fuel possessed, refined, manufactured, produced, blended or compounded in this state by the distributor, or imported by the distributor, whether in the original package or container in which it was imported or otherwise. In the computation of the tax, one per cent of the tax otherwise due shall be deducted before payment for shrinkage."

The distribution of the proceeds of said tax is set up in A.R.S. § 28-1502. Subsection A thereof provides that 7/10 of the proceeds shall be placed in the state highway fund, with the remaining 3/10 paid over to the several county treasurers. Subsection B provides that 2/3 of the 3/10 (1/5 of the whole) shall be retained by the counties, and the balance (1/3 of 3/10 or 1/10 of the whole) paid over to the incorporated cities and towns by the county treasurers. Subsections C and D restrict the use of said funds by the cities, towns, and counties generally for the construction, improvement and maintenance of streets, highways, bridges and administrative expenses in connection therewith.

The power of taxation under the Constitution inheres in the sovereignty of the State and may be exercised only by the Legislature except where expressly delegated to political subdivisions of the

State or to municipal corporations. The authority of municipalities to levy a tax must be made clearly to appear and doubts, if any, as to the power sought to be exercised must be resolved against the municipality. The power to tax is a separate, independent power and exists in municipal corporations only to the extent to which it is clearly conferred by the charter or State statutes and its existence cannot be inferred or deduced from other powers conferred.

City of Phoenix v. Arizona Sash, Door & Glass Co.

80 Ariz. 100, 293 P.2d 438

Maricopa County v. Southern Pac. Co.

63 Ariz. 342, 162 P.2d 619

Home Owners' Loan Corp. v. City of Phoenix

51 Ariz. 455, 77 P.2d 818

Wise v. First Nat'l Bk. of Nogales

49 Ariz. 146, 65 P.2d 1154

In Barrett v. State, 44 Ariz. 270, 36 P.2d 260, the Supreme Court of Arizona had before it the question whether the City of Tucson could enact a liquor license ordinance for the main purpose of securing revenue, under charter authorizing license taxes on any kind of business, notwithstanding State law to secure revenue from same source in same manner. In upholding the validity of the ordinance, the Court said, at page 273:

"\* \* \* It is plain that the securing of revenue for a city is peculiarly and emphatically a matter of local concern, and unless the manner in which this is done is not authorized by its charter, or is in conflict with the general law, the mere fact that the state may seek revenue from the same source and in the same manner does not make the common source of revenue so purely a subject of state-wide concern that the city cannot also secure funds therefrom. \* \* \* "

It will be necessary then to examine the Constitution and general law of the State to determine whether cities and counties have the authority to enact such a law; and, in considering the authority of cities, to distinguish between charter (home-rule) cities and those organized under the common council form of government.

Paragraph 1831, Civil Code of 1913, in subdivisions 17-22, gave common councils the power within the limits of their towns "to license, tax, and regulate" a great number of occupations and

businesses, enumerating them specifically. Under such authority the common council of the town of Tempe passed an ordinance requiring that every hardware establishment (specifically enumerated in said subdivision 22) pay a quarterly license tax, graduated upon average sales. In upholding the validity of the ordinance, the Supreme Court of Arizona in Terrell v. McDonald, 32 Ariz. 30, 255 Pac. 485, stated:

" We have no constitutional prohibition against taxing occupations or trades, and hence the exercise of such power is left with the legislature, to be exerted either directly or delegated to the municipalities of the state. \* \* \* "

It was held, in effect, that said par. 1831 was such a delegation.

The phrasing of the 1913 Civil Code, in this respect, was carried forward until the 1949 amendment, which is found substantially the same today in A.R.S. § 9-240 (B-18), which reads:

" (a) To fix the amount of license taxes to be paid by any person, firm, corporation or association for carrying on any business, game or amusement, calling, profession or occupation, and prescribe the method of collection or payment of the same, for a stated period in advance, and fix penalties for failure to comply by fine, imprisonment, or both.

" (b) Nothing in this article shall be construed as authorizing any town or city to levy an occupational license or fee on any activity when the general law of the state precludes levying such a license or fee."

The City of Phoenix enacted an ordinance assessing a privilege (sales) tax upon all persons doing business in the City of Phoenix. Its charter specifically granted to the City the power to license for the purpose of regulation and revenue all and every kind of business in the city and to fix the rates of licenses upon the same and to provide for the collection thereof. In the litigation that arose, it was contended that the State of Arizona had pre-empted the excise tax field and cities such as Phoenix were precluded from legislating a similar excise tax. In City of Phoenix v. Arizona Sash, Door & Glass Co., supra, the Supreme Court held that the State had not pre-empted the field of excise taxation.

The State Transaction Privilege Tax (an excise tax) provisions are found in Chapter 8, Title 42, of the 1956 Arizona Revised Statutes, beginning with A.R.S. § 42-1301. The distribution of the

proceeds collected follows generally the pattern of the distribution of the State Motor Vehicle Fuel Tax found at A.R.S. § 28-1502. The collections from the Transactions Privilege Tax are distributed in part to the various municipalities (A.R.S. § 42-1341 D), and to the counties (A.R.S. § 42-1342 ).

Accordingly, it cannot be said that the language of A.R.S. § 9-240 (B-18-(b)) pre-empts the field of levying a motor vehicle fuel tax any more than the same provision pre-empted the field of levying a transaction privilege tax. The motor vehicle fuel tax is an excise tax. In the same chapter (Ch. 9) of Title 28, at A.R.S. § 28-1551, the Use Fuel Tax, a companion measure, is specifically defined by the Legislature as an "excise tax". A license tax is an "excise" or "privilege" or "occupation tax" not a "property tax" within the State constitutional provisions that all property shall be taxed in proportion to its value. (Pauley v. State of California, 75 F.2d 120, 124.)

Counties are created by the Legislature regardless of the wishes of the inhabitants of the area, for the purpose of exercising a certain portion of the general powers of the government in specified localities. Implied powers of county boards of supervisors do not exist independently of legislative grants of express powers, since the only function of an implied power is to aid in carrying into effect a power expressly granted. (Associated Dairy Products Co. v. Page, 68 Ariz. 393, 206 P.2d 1041.) In the field of taxation the Legislature has granted counties, at A.R.S. § 11-251 (12), the power to levy an "ad valorem" tax, and at Article 2, Chapter 6, Title 42 of the 1956 Arizona Revised Statutes, beginning with A.R.S. § 42-1131, has made it the mandatory duty of the sheriff of each county to collect certain specified license (excise) taxes, imposing a liability on the sheriff (A.R.S. § 42-1108 A) for failure to collect the same. Not having been granted the specific power to impose an excise tax other than those specified in Article 2, Chapter 6, Title 42, a county cannot adopt a gasoline tax ordinance.

In Terrell v. McDonald, supra, (common council), and in Barrett v. State, supra, and City of Phoenix v. Arizona Sash, Door & Glass Co., supra, (both charter city cases), the Supreme Court of Arizona held that the State had not pre-empted the field of excise taxation.

Therefore, it is the opinion of this office that cities in Arizona, whether charter or common council, have the authority to

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enact ordinances establishing a local gasoline tax, and that counties do not have such authority. By legislative enactment, the Legislature could, as indicated in A.R.S. § 9-240 (B-18-(b)), broaden or restrict such powers of the cities and counties.

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